DURING the Christmas recess the School met with an irreparable loss in the death of its assistant-librarian, George Albert Arnold. Mr. Arnold entered the service of the School in September, 1872, at the age of twenty-two, and remained in that service continuously until his death, — a period of more than twenty-one years.

During all that time he was a model of faithfulness and devotion, of disinterestedness, willingness, amiability, patience, and good temper. Though never strong, he was almost never absent from his post. Though he never imposed his own duties upon others, yet he never complained that the duties of others were imposed upon him. Whenever there was anything to be done which he could do, he never raised the question whether it belonged to some one else rather than to him to do it. He will be greatly missed at Austin Hall, as well by the students as by the officers of the School. C. C. L.

RECENT CASES.

AGENCY — EMPLOYERS' LIABILITY ACT. — One of defendant's employees was killed by an accident due to a defect in the condition of a track, owned and maintained by one W., on which defendant was running a train. *Held*, that this was not a defect in the "ways" under the St. 1887, c. 270, § 2. *Engel* v. *N. Y., P. & B. R. Co.*, 35 N. E. Rep. 546 (Mass.). Knowlton, J., dissenting.

The majority seem clearly correct. The court cite *Trask* v. *O. C. R. R.*, 156 Mass. 298, where it was held that the defendant was not liable for the condition of a track which was not under its control; that decision is conclusive of the case before the court.

BANKRUPTCY — COLLATERAL SECURITY — DISTRIBUTION OF ASSETS. — Where a creditor, having a claim secured by collateral against the insolvent estate of a deceased person, filed and proved his claim in the probate court for the full amount, and afterwards realized from his security less than the amount of his claim, he is entitled to a dividend upon the whole amount, and not merely to one upon the difference between his claim as proved and the sum realized from his security. *Furness* v. *Union Bank*, 35 N. E. Rep. 624 (Ill.).

The decision seems sound. As a party having a joint and several obligation can prove in bankruptcy against both the joint and separate estates for the full amount of his claim, when the bankruptcy proceedings are simultaneous (*In the matter of Peter Farnum*, 6 Boston L. R. 21), so here the creditor should be given the reward of his diligence, and be allowed to prove in full against the insolvent estate, and then realize on his security. Of course he would not be allowed to retain more than the amount of his debt. The case carries out the principle set forth in an earlier Illinois decision: *In Re Bates*, 118 Ill. 524.

BILLS AND NOTES — COLLATERAL AGREEMENT — INNOCENT PURCHASER. — A promissory note was given with collateral agreement that if the consideration was not performed, the note should not be paid. *Held*, that the note could be enforced against the maker by a transferee who had notice of the agreement, though the payee afterwards failed to perform the consideration. *Jennings* v. *Todd*, 24 S. W. Rep. 148 (Mo.).

There is very little authority on this point, but it seems difficult to support the case on principle. The court seem to overlook the distinction between this case and one in which there is merely an executory consideration without any collateral agreement. The general rule is that a contemporaneous collateral agreement binds the immediate parties and all others who have notice thereof. If the transferee had notice of the agreement, as is admitted in this case, it is difficult to see how he can be in any better situation than his transferor.

BILLS AND NOTES — NEGOTIABLE BONDS — DELIVERY — BONA FIDE PURCHASERS. — A village corporation signed and sealed certain negotiable bonds, payable to bearer, but, instead of delivering them, directed that they should be destroyed, and,

believing that this had been done, issued another set of bonds at a different rate of interest in their place. The bonds were not in fact destroyed, but were stolen from the custody of the corporation, and came into the hands of the plaintiff, who, as a *bona fide* purchaser for value, brings this action to recover interest upon them. *Held*, that the plaintiff may not recover. Negotiable bonds stand upon the same footing with bills of exchange and promissory notes, and cannot become operative without being issued, *i. e.*, delivered as evidence of a subsisting debt. Without such delivery they have no legal inception, and are without value in the hands of a *bona fide* purchaser for value even if the negligence of the defendant corporation made the stealing possible. *Germania Savings Bank* v. *Village of Suspension Bridge*, 26 N. Y. Sup. 98.

The rule adopted by this decision in its exact scope is well settled, namely, that a delivery by the obligor is under all circumstances necessary to make a bond operative, and that the innocent purchaser for value incurs the risk that this has not been complied with. This follows from the nature of bonds as specialties, and in so far as it applies to bills and notes, those instruments are treated as specialties. The case must be carefully distinguished from that of a transfer where the bond has had already its legal inception by delivery, for it is well settled that a *bona fide* purchaser for value, in such a case, acquires a good title although the bonds were stolen from their true owner, by the vendor. *Leavitt* v. *Dabney*, 7 Robt. (N. Y.) 350; *Carpenter* v. *Rommell*, 5 Phila. (Pa.) 34; *Spooner* v. *Holmes*, 102 Mass. 503. But see *contra*, *Kimball* v. *Billings*, 55 Me. 147.

CONFLICT OF LAWS — ATTACHMENT BY CREDITORS OF DEBTOR WHO HAS ASSIGNED UNDER FOREIGN STATUTE. — A foreign statute provides that a debtor who makes a voluntary assignment for the benefit of his creditors may, on compliance with the statute, be discharged from his debts; that creditors participating in the proceedings shall be bound by a discharge granted by the court; and that non-participating creditors shall be debarred from receiving anything out of the assigned estate unless a surplus remains. *Held*, that the statute is coercive, and assignments made in compliance with it are ineffectual to pass to the assignee title to *choses in action* or other chattels in New York, to the prejudice of subsequent attachments by creditors of the assignor. *Barth* v. *Backus*, 35 N. E. Rep. 425 (N. Y.).

The court in carrying out in this case the principle of not giving effect to coercive statutes of another State has really gone further than in the cases where it has refused to regard assignments under the ordinary bankruptcy and insolvency statutes of other States; for in the case of an assignment under an ordinary bankruptcy or insolvency statute the title to the debtor's property passes from him to the assignee by virtue of an order of court made under the statute, and in disregarding such assignments the court is directly disregarding the force of a foreign statute, while in an assignment in compliance with the statute in question here the title passes to the assignee by the direct act of the debtor, and in disregarding the assignment the court disregards a transfer by an individual, and only indirectly defeats the foreign statute. The court holds that as a general rule it will recognize a transfer of title by the act of a non-resident; but if the court had recognized this assignment so far as to allow that title passed to the assignee, it could not, in conformity with its previous decisions, have allowed the attachment (see *Thurber* v. *Blanck*, 50 N. Y. 80), and it would then be difficult for it to prevent the distribution of the property in accordance with the foreign statute.

CONFLICT OF LAWS — CHARITABLE BEQUEST. — A, domiciled in Peru, bequeathed personal property to establish a charitable institution in New York which his executors and a board of trustees selected by the Surrogate of New York were to manage. The will was proved in Peru, ancillary executors were appointed in New York, and the trustees were selected in conformity to the will. Upon application to the Legislature they were incorporated as "The Sevilla Home" with full power to receive and manage the bequest. Under the law of Peru the executors would hold the funds till the trustees were appointed, who would then have the beneficial right which would previously be in abeyance. According to the New York law the bequest would have been invalid, as there was no trustee at the testator's death to receive the bequest. "The Sevilla Home" prayed that the ancillary executors pay over the funds in their hands. *Held*, that the court would enforce the will and order the fund to be paid over. (1) By comity, a bequest of personalty will be allowed to operate according to the *lex domicilii* where, as here, it is not against public policy. (2) The court is not taking property from one claimant and giving it to another, since by the law of Peru it was held by the executors awaiting distribution and had not vested in a legatee or in the next of kin. (3) If these considerations are insufficient, the action of the Legislature sufficed to make the bequest good. As the beneficial interest in the property had by the law of Peru vested in no

one, the Legislature could accept the gift and provide for its administration in the manner designated by the will. *Dammèrt* v. *Osborn*, 35 N. E. Rep. 407 (N. Y.).

The case is perfectly sound. The difference between the effect of a statute *passed* subsequently to the testator's death, in the case of this foreign will and in case of a New York will, is interesting. A statute where the will was a domestic one would be in derogation of vested rights if it had provided that "The Sevilla Home" should take the bequest, for under the common law it would be depriving the next of kin or some legatee of a beneficial right of property. But under the Peru law, where the beneficial interest awaited ascertainment, the statute was operative.

CONSTITUTIONAL LAW — "LIBERTY" — LICENSES.— Statute provided that persons engaged in hiring laborers in certain counties in the State to be employed beyond the limits of the State must pay a license of $1000. *Held*, that this Act was unconstitutional. It could not be supported as an exercise of the taxing power because it did not apply to all counties of the State. It could not be supported as an exercise of the police power because it was so far "restrictive or prohibitory" of a trade not "inherently dangerous or harmful to the public," as to deprive citizens of their "liberty." *State* v. *Moore*, 18 S. E. Rep. 324 (N. C.).

This adds still another to the rapidly increasing number of opinions of the State courts which declare that "liberty" in our constitutions means freedom to pursue any calling. The objections to this interpretation have been fully stated in prior numbers of the HARVARD LAW REVIEW. 4 Har. Law Rev. 365; 7 ib. 300. We submit that, according to the true interpretation of the term "liberty," such a statute as this cannot be set aside on the sole ground that its effect is to seriously restrict or even to prohibit a given trade.

CONSTITUTIONAL LAW — POLICE POWER. — Laws 1889, c. 515, § 4, forbidding the sale of vinegar containing any artificial coloring matter, is not in conflict with the clause of Amendment XIV. of the United States Constitution, which provides that no person shall be deprived of "life, liberty, or property without due process of law." *People* v. *Girard*, 26 N. Y. Supp. 272 (Supreme Ct.).

This is an interesting case to compare with *People* v. *Marx*, 99 N. Y. 377, where it was held that a statute prohibiting the sale of all substitutes for butter was unconstitutional, because (to quote the language of Martin, J., in the principal case) "the prohibition was not limited to unwholesome substances." It would seem that the principle of that case required a similar decision in this, yet the court cite it as an authority for a contrary result. The court cite *Powell* v. *Pennsylvania*, 127 U. S. 678, as if it were entirely in accord with *People* v. *Marx*, yet in that case a similar statute was held constitutional. On the whole, the case seems not very well considered, and should not be given very great weight if the question were again to reach the highest courts of New York.

CONSTITUTIONAL LAW — POLICE POWER — FREEDOM OF SPEECH.— A statute made it unlawful to use profane language on the lands of the Henrietta Cotton Mills. *Held*, the statute was constitutional though applied to language not amounting to a nuisance, and was a valid exercise of the police power though limited in its operation to one locality. *State* v. *Warren*, 18 S. E. Rep. 498 (N. C.).

The decision seems a perfectly sound one. So long as such legislation is not arbitrary, the expediency of it is a matter for the Legislature to decide.

CONSTITUTIONAL LAW — POLICE POWER — REVOCATION OF LOTTERY FRANCHISE. — Statute revoked a previous grant of the right to hold a lottery and did not provide for any compensation. It was urged that this violated Section 10 of Article 1. of the Constitution of the United States, which forbids the States to pass laws impairing the obligation of contracts, and the court was confronted with decisions of its own to that effect. *Held*, that the court, despite its previous decisions, was now bound by *Stone* v. *Mississippi*, 101 U. S. 814, which held that statutes revoking lottery grants were constitutional. *Com.* v. *Douglas*, 24 S. W. 233 (Ky.).

Cases where State courts have in deference to the decisions of the Supreme Court of the United States overruled their previous decisions upholding the constitutionality of State laws are not uncommon; but cases like the one here noted where the State court has overruled its decisions impeaching the constitutionality of the State laws are more rare. The decision of a State court against the constitutionality of a State statute is not subject to review on error by the Supreme Court of the United States, so the State court is not under the same restraint to follow Supreme Court decisions affirming the constitutionality of State statutes that it is under to follow decisions impeaching the constitutionality of State laws; but it is obvious that the propriety of adopting the construction given by the Supreme Court to the Constitution is the same in both sets of cases.

CONTRACTS — PAYMENT OF DEBT. — By an instrument purporting to be a policy of insurance, the defendants guaranteed to the plaintiff payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default. Subsequently the bank made an arrangement with its creditors by which it was to be wound up and a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts; the plaintiff did not assent to this scheme, but it was binding upon her by the colonial statute. *Held* (affirming the judgment of the Queen's Bench Division), that the defendants remained liable to the plaintiff. *Dane* v. *The Mortgage Insurance Corporation*, [1894] 1 Q. B. 54.

Lord Esher, with whom concurred Lopes, L. J., thought that the contract was one of insurance against a certain event and that the defendants were liable on the happening of that event. Kay, L. J., said it was immaterial whether the contract were considered as a contract of suretyship or a contract of insurance, as in either case the defendants would be bound to pay, and would thereupon become subrogated to the plaintiff's rights. Apparently it would make no difference in the construction of such a contract, which view is adopted.

CONTRACTS — REFUSAL TO ACCEPT PERFORMANCE. — Plaintiffs and defendant made a contract for manufacture of shears, defendant to furnish the principal materials, plaintiffs to add to them a few minor parts and the labor necessary for their manufacture. The shears were not made according to sample; but the defect was not apparent, so that defendant did not discover it when part of the lot was delivered to him nor until the balance was ready for delivery. He refused to accept any more, but kept those already delivered to him without offering to return them. Plaintiffs now sue on the contract for work and labor. *Held*, plaintiffs cannot recover, as they have never performed on their part. The title remained in the defendant during the entire transaction, and he gained title to the materials added by plaintiffs by accession. Consequently, it is not the case of delivery by a vendor to a vendee "on trial" where after a reasonable time the vendee cannot set up the defects. *Mack* v. *Snell*, 35 N. E. 493 (N. Y.).

O'Brien and Maynard, JJ., dissent on the ground that "a warranty or agreement on the part of plaintiffs that the manufactured article would be like the sample does not survive acceptance." In other words, they say there is nothing in the distinction of the majority as given above. It seems that the distinction is sound nevertheless. In case of a sale this doctrine is laid down that there must be an objection within a reasonable time or not at all — to protect the vendor; in case of the vendee's refusal to accept he might sell advantageously at that time. Here, even though the plaintiffs had had the goods in the mean time, they could have done nothing with them, since they were the defendant's goods. The mere fact that defendant took his own goods cannot make him liable in any way. The whole case comes down to this, that the plaintiffs had not performed the work and labor as they had agreed, and therefore they cannot recover.

CORPORATIONS — EQUITABLE JURISDICTION. — *Held*, *inter alia*, that a *de facto* corporation, as such, may maintain a bill in equity to restrain its directors from ignoring its existence, wrongfully usurping and using its corporate name and franchise, etc. *Union Water Co.* v. *Kean*, 27 Atl. Rep. 1015 (N. J.).

This point, it would seem, is of no special difficulty or novelty, but the case deserves mention on account of the careful treatment given by the court to cases involving equitable and *quo warranto* proceedings as applied to corporations and stockholders. There is a particularly neat exclusion by Pitney, V. C., of decisions in which the equitable remedy has been denied, not because of the incapacity of a court of equity to deal with the subject-matter of the question presented, but because of the complaint not having been made by the party who had a right to complain. The vice-chancellor also gives a clear exposition of the requisites of *de facto* corporate existence.

CORPORATIONS — LIABILITY OF A PROMOTER. — A, having agreed to purchase land in Louisiana from B, issued a prospectus for the formation of a company to carry on the business of raising fruit; procured shareholders; and attended the meetings, at the first of which he was elected president. By authority of the shareholders, A was empowered to pay a much larger price for the land than he had agreed on, but he carried out his bargain with B on substantially the terms first made. *Held*, that A had acted as agent of the corporation, and could not keep the profits he had made from the transaction. *Plaquemines Tropical Fruit Co.* v. *Buck*, 27 Atl. Rep. 1094 (N. J.).

The facts of this case are somewhat complicated, but the decision seems sound. It is certainly a just result that one who gets up a company should be compelled to account for any profits which he may have made by fraudulently concealing the true state of affairs. The court takes pains to distinguish this case from one where a promoter, acting in good faith, sells land to a corporation at an advance in price. For a

discussion of the subject, see the opinion of Lord Cairns in *Erlanger* v. *Phosphate Co.*, 3 App. Cas. 1218. The authorities are collected in 1 Mor. Private Corp., §§ 545, 546.

CRIMINAL LAW — AGE OF ACCOUNTABILITY. — *Held*, that an erroneous instruction that the age of presumptive legal accountability for crime begins at eleven, instead of at fourteen, may be sufficient ground for reversal of judgment, although the accused was concededly two months over fourteen when he committed the act. Brewer and Brown, JJ., dissenting. *Allen* v. *United States*, 14 Sup. Ct. Rep. 196.

It is difficult to see how the error was prejudicial to the prisoner. The court say that it was, because the jury were led to believe that the prisoner had been under the weight of full accountability three years longer than was the fact. But he was fully accountable; the defence asked for no instructions on this point, and the jury saw the prisoner and were able to judge for themselves how mature he was. It seems strange to assume that this mistake in regard to irrelevant matter influenced the jury against the defendant. Judgment in this case was reversed mainly on another ground.

CRIMINAL LAW — EXTORTION — ATTEMPT TO COMMIT. — By New York Penal Code, § 552, "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." By § 34, "An act done with intent to commit a crime, and tending, but failing to, effect its commission, is an attempt to commit that crime." In an indictment for an attempt to commit extortion, it appeared that prosecutrix was not put in fear by defendant's threats, but parted with her money for the purpose of inveigling him into the commission of the crime. *Held*, that the indictment could not be sustained, since fear, a necessary element of the crime, was wanting. O'Brien, J., dissented. *People* v. *Gardiner*, 25 N. Y. Supp. 1072 (Supr. Ct.).

It is submitted that the dissenting opinion is the more sound. It is admitted by the court that, if the completed act, accomplished as intended and attempted, would constitute a crime, there was here an attempt. But the act as contemplated by the defendant was the obtaining of the money by putting in fear. This act was not completed in this case, and so the substantive crime was not committed. But if completed it would have constituted extortion, and so it would seem that what was actually done amounted to an attempt. The case seems analogous to an attempt to pick an empty pocket, which is now universally held to be an attempt to commit larceny (1 Bishop, Cr. Law, 8th ed., § 743); and even more closely analogous to the cases holding that there is an attempt to obtain money by false pretences, when the money is parted with, without belief in the pretence. 2 Bishop, Cr. Law (8th ed.), § 488; *Reg.* v. *Hensler*, 11 Cox C. C. 570; *Reg.* v. *Mills*, 7 Cox C. C. 263 (*semble*).

CRIMINAL LAW — FORGERY — TWO CRIMES UNDER ONE INDICTMENT. — N. Y. Code, Crim. Proc., § 278, provides that an indictment must charge but one crime and in one form. Sec. 279 provides, further, that the crime may be charged, in separate counts, to have been committed in a different manner, or by different means. Sec. 521 of the Penal Code enacts that a person who utters a forged instrument is guilty of forgery in the same degree as if he had forged it. *Held*, that an indictment may in one count charge the forgery of an instrument and in another the utterance, on the same date and at the same place, of the same instrument. *People* v. *Adler*, 35 N. E. Rep. 644.

In an opinion by Gray, J., the court admit that forgery and uttering a forgery are two distinct offences, both at common law and under the code; but they regard this as an intermediate case. The learned judge argues that, whereas, before the code was passed, such counts could be joined in one indictment (see *People* v. *Rynders*, 12 Wend. 425), though different punishments were provided for the two offences; now, when the penalty for each is the same, there is all the more reason for upholding such an indictment, unless the language of the code expressly forbids it, which the court determines it does not. It may be, as Gray, J., says, that where the two offences are based on the same or a continuous state of facts, the prisoner is not prejudiced by such a form of pleading. Yet, without saying that the decision is wrong, it would seem that the court has given wide scope to the principle that statutes are in general to be interpreted by common-law rules.

EQUITY JURISDICTION — LIBEL ON PATENT RIGHTS — INTIMIDATION. — A court of equity will enjoin an insolvent person from publishing libellous statements regarding the validity of plaintiff's patents, and threatening all who deal with him with suits for infringement, which he had no intention of bringing, thereby intimidating the plaintiff's customers. *Shoemaker* v. *S. Bend Spark Arrester Co.*, 35 N. E. Rep. 280 (Ind.).

It seems pretty well settled by authority that equity will not restrain the publication of a libel, but will leave the parties to settle their rights at law. In *Boston Diatite Co.*

v. *Mfg. Co.*, 114 Mass. 69, where the complaint alleged that the defendant threatened certain persons with suits for infringement of their patent, the court dismissed the bill. It must be noticed, however, that the bill is chiefly to restrain the further publication of a libel, and mentions, but indirectly, the fact that the defendant threatened the plaintiff's customers with suits. In a case very like the one under discussion, *Enoch* v. *Kane*, 34 F. R. 46, Blodgett, J., says, "The *gravamen* of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not mean to prosecute." In the principal case the court leave the question open as to how they would decide in either the event of defendants being solvent; or if the wrong complained of was a libel merely. Had the court here refused to grant the plaintiff's petition, they would have cast a great hardship upon him, for which he had no remedy, as his action at law was worthless.

INSURANCE — NOTICE — WAIVER. — Plaintiff was the beneficiary in a policy taken by her husband in defendant Accident Insurance Society. One of the provisions of the policy was that failure to give notice of the death of the insured with full particulars of the accident within ten days from date of injury or death, would invalidate the policy. The insured was killed August 22d in the Park Place disaster, but his body was not found till the 25th. Notice was given the second of September. This notice was served without objection, and at subsequent dates the society furnished blanks for proof of loss, and asked for further particulars which were furnished. *Held*, (1) That the ten days do not begin to run until the fact of death and the circumstances are known. (2) That there was a waiver, assuming the ten days to run from the time of death, by the subsequent conduct of the defendant. *Trippe* v. *Provident Fund Society*, 35 N. E. 316 (N. Y.).

The point as to waiver is eminently sound and in accord with the weight of authority. May on Ins., sect. 465. The question about notice seems, strangely enough, to be a new one. There can be no other decision reached but the one the courts render; for the particulars were to be furnished, and of course they could not be given until the death was known. The opposite holding would be to make the plaintiff contract to do an impossible thing, — which, of course, was not the intention of the parties at the time of contracting.

JUDGMENT — DIRECT ATTACK — WAIVER. — The justice of the peace before whom the action was originally tried was plaintiff's agent for the collection of claims, including the claim sued on. These facts appearing on an appeal to the circuit court, it was *held*, that a motion to dismiss the appeal was properly denied, it not appearing when defendant first acquired knowledge of the facts. Ross, J., dissenting. *Baldwin* v. *Runyon*, 35 N. E. Rep. 569 (Ind.).

The court admit that the objection is fatal if taken as soon as known. If not taken then, however, it is waived, and the burden of proof is on the one objecting to show that his objection is taken as soon as known. As that did not appear in the present case the defendant was held to have waived his right of objection. The principle involved seems to be the same as in the case of disqualification of jurors. It is generally held in those cases that the objection must be made as soon as discovered, or the party objecting will be held to have waived it. Graham and Waterman on New Trials, (2d ed.) pp. 239, 247.

PARTNERSHIP — INSOLVENCY — PROOF OF A FIRM NOTE INDORSED BY ONE PARTNER. — *Held*, that the holder of a firm note, made payable to one of the partners and indorsed by him, may prove against the estates of the firm and the indorsing partner, before a receipt of a dividend from either. *Roger Williams Nat'l Bank* v. *Hall et al.*, 35 N. E. Rep. 666 (Mass.).

This decision is eminently just and would generally be followed in the United States, but in England the rule formerly was *contra*. Lord Eldon, in *Ex parte* Bevan, 10 Ves. 107, said, "I could never see why a creditor having both a joint and a several security, should not go against both estates. But it is settled that he must elect." The English law has been altered by 32 & 33 Vict. chap. 71, § 37, which permits proof against both estates in such a case. See *Ex parte Honey*, L. R. 7 Ch. App. 178, which is a case decided under the said Act.

PARTNERSHIP — OUTSIDE TRANSACTIONS BY ONE PARTNER — RIGHT OF OTHER PARTNERS TO PROFITS. — *Dictum*, following *Dean* v. *Macdowell*, 8 Ch. Div. 345, that a bill cannot be maintained against one partner by his fellows for a share in the profits of transactions outside the scope of the partnership, though engaged in by him in violation of an express agreement with the firm, unless by violation of the agreement profits have been diverted from the partnership business; and further, following *Aas* v. *Benham*, [1891] 2 Ch. 244, that co-partners are not entitled to share the profits earned by a member of the firm acting for himself on information gained in carrying on the partner-

ship business, if such information has not been used for purposes within the scope of the partnership. *Latta* v. *Kilbourn*, 14 Sup. Ct. Rep. 201, 210–211.

These *dicta* are unquestionably correct; but they are noted here because there has been almost no law on the points except the two English cases.

PARTNERSHIP — SALE OF PARTNER'S INTEREST — REFUSAL BY BUYER TO PERFORM — DAMAGES. — The plaintiff agreed with the defendant to sell him an undivided interest in a partnership of which he, the plaintiff, was a member. The defendant wrongfully refused to perform his part of the contract of sale, and a question arose as to the damages to which the plaintiff was entitled. It was argued by counsel for the defence that since the assets of the partnership consisted of real estate, the rule of damages to be applied was that which pertains to sales of real property. *Held*, however, that the plaintiff should recover damages according to the rule applicable to sales of personalty, since the undivided interest in the partnership was personal property. *Van Brocklen* v. *Smeallie*, 35 N. E. Rep. 415 (N. Y.).

This result is a logical and interesting consequence of the underlying theory of such cases as *Menagh* v. *Whitwell*, 52 N. Y. 146; *Morss* v. *Gleason*, 64 N. Y. 204; and *Tarbell* v. *West*, 86 N. Y. 287. "It is now well settled," said Andrews, J., in the last case, "that a purchaser from one partner, of his interest in the partnership, acquires no title to any share of the partnership effects, but only his share of the surplus, after an accounting and an adjustment of the partnership affairs."

In these New York decisions one finds a gradual and desirable recognition by the courts of a partnership as an entity, — of the mercantile view of a firm as an impersonal being which has independent rights. This conception of a partnership, caused by the decision of the House of Lords in the case of *Cox* v. *Hickman* (8 House of Lords Cases, 268), has recently received a clear and useful explanation from Professor Beale in chapters I. and V. of Parsons on Partnership (4th ed.). The definition there given of a partnership is as follows: "Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them."

QUASI CONTRACT — PAYMENT BY STRANGER — BINDING ON CREDITOR. — Suit in equity. Defendants were indebted to plaintiff. Without request or ratification by defendants, the debt was paid to plaintiff by a stranger. *Held*, such payment discharges the debt so far as the creditor is concerned, and also as to the debtor if he ratify it. *Crumlish's Adm'r.* v. *Cent. Imp. Co. et al.*, 18 S. E. Rep. 456 (W. Va.).

The decision may be noted as to the part affecting the creditor. In England, the prevalent view, first laid down in *Grymes* v. *Blofield*, Cro. Eliz. 541, continues to be, that payment by a stranger of a debt without the privity of the debtor does not discharge the debt, even as to the creditor. This, however, has been questioned by Willes, J., in *Cook* v. *Lister*, 3 C. B. N. S. 594, and by Cresswell, J., in *Jones* v. *Broadhurst*, 9 M. & Sc. 173. In this country the doctrine as held in the principal case is law in California, Wisconsin, Ohio, Alabama, and Iowa. Although it seems quite unjust that a creditor accepting payment of a debt from a stranger should be allowed to maintain an action against the debtor for the same debt, on the technical theory that he is a stranger to the consideration, yet the reasons advanced against the policy of allowing strangers to meddle with contracts might be applied in this case. And on this question the same division of opinion is likely to exist in the courts of this country as exists in reference to the rights of third parties to sue on contracts.

REAL PROPERTY — CY PRES — CHARITIES. — Property was given to a college for the purpose of educating poor young men for the ministry. After the fund had vested, the college, through lack of money, suspended the exercise of its functions. *Held*, that this did not cause a reverter of one half of the fund to the grantor's heirs, but that equity would cause it to be applied through another college to effectuate in the same manner the original purpose, and in case the first college resumed its duties, then the property would be restored to it. *Barnard* v. *Adams*, 58 F. R. 313 (C. C. N. D. Iowa).

It is strange that the court here did not notice the case of *Miller* v. *Chittenden*, 2 Iowa, 315, where Wright, C. J., says, at page 369: "Though the deed may clearly manifest a charitable or benevolent disposition, it will only be executed or upheld for the benefit of the object designed, and will not be in favor of some other similar object. . . . We need not add, therefore, that the doctrine of *cy pres*, at least in its original form, as administered in the English courts, has no application here." *Barnard* v. *Adams* is unquestionably right if the *cy pres* doctrine is in force in Iowa, but the *dictum* of Wright, C. J., seems an express repudiation of it. It is to be hoped that the case in the Federal court will be followed.

REAL PROPERTY — RULE AGAINST PERPETUITIES. — The testator devised in trust for the lives of his son and daughter, and after their deaths upon trust to sell; and as to the proceeds of such sale and the rents and profits to arise from the property until sale, to pay the same equally to the children of the son and daughter, and the lawful issue of such of them as might be then dead leaving issue, such issue to be entitled to no more than their parent would have been if living. *Held*, that the trust for sale was bad as violating the rule against perpetuities. That the trusts of the property and the rents and profits thereof were good, and that the interest of a deceased beneficiary descended as realty. *Goodier* v. *Edmunds*, [1893] 3 Ch. 455.

REAL PROPERTY — STEAM RAILROADS IN STREETS — ADDITIONAL SERVITUDE. — The use of a street for a steam railroad is not a legitimate use for public purposes, and if abutting property is injured thereby the owner is entitled to damages, whether the fee of the street be in him or in the city. *White* v. *N. W. No. Car. R. Co.*, 18 S. E. Rep. 330 (N. C.).

This is a case of first impression in North Carolina, and the court follow the great weight of authority in this country. Although it would seem difficult to reach any other conclusion on common-sense grounds, there has nevertheless been a certain amount of conflict on this question, especially as to whether an abutting owner may recover damages where the fee of the street is in the public. The subject is fully discussed and cases cited in Lewis on Eminent Domain, §§ 111–115, Elliott on Roads and Streets, 528. Pierce on Railroads, 234, 238, approves the contrary doctrine.

SALES — CONDITIONS — RIGHT TO RETURN. — Plaintiffs sold defendant a reaper upon the condition that if it did not work to his satisfaction he might return it. After a trial he wished to return it, giving as his reason that it was too heavy for his horses, and other whimsical objections. Plaintiffs refused to receive it, and sued him for the purchase price. The court below instructed that "if the contract was that the machine was to give satisfaction to the defendant, then it should be a fair and reasonable satisfaction, and not a whimsical or unreasonable satisfaction." On exception, the Supreme Court *held* that this instruction was wrong; that if the dissatisfaction is honest, no matter how unreasonable, the defendant is relieved of all liability. *Osborne & Co.* v. *Francis*, 18 S. W. 591 (W. Va.).

This case is in accord with the great weight of authority. See Benjamin on Sales (Bennett's 6th ed.), pp. 568–70. For a case almost identical, see *Seeley* v. *Welles*, 120 Pa. St. 75. It makes no difference whether it is regarded as a sale with a condition subsequent rendering it void, or as a contract with a condition precedent. In either case, if the agreement is that goods are to be "to the satisfaction" of the vendee, he can reject even whimsically as he has contracted for that right.

SALES — STOPPAGE IN TRANSITU — EFFECT UPON RIGHTS OF PARTIES. — *Held*, that a vendor who has stopped in transit part of the goods sold, and has never offered to deliver them on payment of the contract price, is entitled in the vendee's insolvency proceedings to compensation only for the part of the goods actually delivered to the vendee, since it is presumed after a reasonable time that the vendor has taken the goods stopped in transit in full payment for their price. *Shaw et al.* v. *Lady Ensley Coal, Iron, &c. R. Co.*, 35 N. E. 620 (Ill.).

This case recognizes the rule of law that the vendor, in exercising his right of stoppage *in transitu*, takes the goods as those of the vendee, and receives merely a lien upon them for the contract price, and undoubtedly places the true construction upon his failure to demand the contract price and to offer the goods to the vendee upon such payment. See 23 Am. & Eng. Encyc. of Law, 932, note 2, and cases there cited.

STATUTE — CONSTRUCTION OF. — A statute of the State of New Jersey, passed Nov. 21, 1794, provides that "all proceedings whatever in every court of law or equity of this State are required to be in the English language, and in no other." On March 16, 1891, the statute was passed on which this action was brought. It provides that all notices of sales of land by virtue of judicial proceedings shall be inserted in two newspapers, and that "In all counties wherein there is now published a paper in the German language, it shall be the duty of the officer in charge of the sale also to publish the notices in such paper." *Held*, that since the statute of 1891 did not expressly repeal that of 1794, it must if possible be given a construction reconcilable with it, and that therefore the notice to be inserted in the German paper should be written in the English language. *Tappan* v. *Dayton et al.*, 28 Atl. Rep. 1 (N. J.).

This decision shows how far courts, in construing a statute, will depart from the probable intention of the Legislature, rather than consider it to repeal by implication a statute previously existing. "Laws are presumed to be passed with deliberation and

with full knowledge of all existing ones on the same subject, and it is therefore reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable." Sedgwick, St. Const. 106.

TORTS — SELF-DEFENCE. — The defendant, in order to protect himself from X who carried a bag of dynamite, took the plaintiff's hand, and so gently drew him between himself and X that plaintiff was barely conscious of the impulse. An explosion of dynamite followed, by which plaintiff was injured. *Held*, the defendant was liable if he deliberately placed the plaintiff as a screen between himself and the danger. It was a question for the jury whether his action was intentional or a mere reflex resulting from the acts of X. *Laidlaw* v. *Sage*, 25 N. Y. Supp. 955.

For a discussion of this case, see 7 HARVARD LAW REVIEW, 302.

TRUSTS — STATUTE OF LIMITATIONS. — A fund was held by trustees for A and B equally, for their lives, and then the share of each to go to his children. The trustees gave this fund to a solicitor, who invested it, with money belonging to other persons, in an equitable mortgage. This mortgage was paid off, and, A having died, the solicitor gave A's share to his children, and kept B's share in his own hands. The solicitor then died. Twelve years after, B brought action for his moiety against the solicitor's executrix. *Held*, that the statute of limitations was no bar on the ground that the solicitor had been an express trustee, and that therefore B could recover. *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

The general rule is that the statute of limitations does not begin to run in favor of an express trustee until he has done some act which is inconsistent with or repugnant to the fiduciary relation which he bears to the *cestui que trust*. A constructive trustee, on the other hand, becomes such because of his wrongful act and adverse claim, and hence the statute runs in his favor from the first. The distinction between an express and a constructive trustee in this respect is neatly exemplified in the above case. The facts showed quite clearly that a fiduciary relation, rather than a relation of debtor and creditor, arose between the solicitor and those who intrusted to him the fund. B's cause of action, therefore, is based on the mere failure of the solicitor to hand over the moiety. This of itself showed no adverse claim of title by the solicitor sufficient to make him a constructive trustee, and hence, the fiduciary relation continuing to exist, the statute never began to run. The decision seems clearly right. See 2 Lewin on Trusts (9th ed.), 983 *et seq.*

REVIEWS.

SPEECHES AND ADDRESSES OF WILLIAM E. RUSSELL. Selected and Edited by Charles Theodore Russell, Jr. With an Introduction by Thomas Wentworth Higginson. 8mo, pp. 469. Boston: Little, Brown, & Co., 1894.

The remarkable success of Governor Russell's career must of itself lend a certain interest to a collection of his speeches and addresses, whatever their intrinsic merit. To the discreet reader, curious to fathom the reasons of this success, much is here suggested. The speeches on the tariff show Governor Russell's method at its best. He investigated thoroughly the industries of each town in which he spoke, and drew inferences from the daily life of the people who heard him. He was not content with generalities, but sought to drive his meaning home. In permitting a number of his speeches to be thus collected in permanent form, he "has acted," as Colonel Higginson says, "wisely — and, at any rate, frankly — showing himself at his average, without apology and without